No. 91-494

In the Supreme Court of the United States

OCTOBER TERM, 1991

FULL GOSPEL PORTLAND CHURCH, ET AL., PETITIONERS

v.

ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the Equal Access to Justice Act, 28 U.S.C. 2412(d)(3), authorizes the award of attorney's fees for work performed in connection with administrative deportation proceedings conducted by the Immigration and Naturalization Service, on the theory that such proceedings are "adversary adjudication[s]".

2. Whether the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A), authorizes the award of attorney's fees for work performed in such proceedings, on the theory that such proceedings are part of a "civil action."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-32a) is reported at 927 F.2d 628. The opinion of the district court (Pet. App. 40a-46a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 12, 1991. A petition for rehearing was denied on June 7, 1991 (Pet. App. 35a-36a). On August 28, 1991, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 16, 1991, and the petition was filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Full Gospel Portland Church employed petitioner Hae-Sook Kim, a native of Korea, as a choir director, piano teacher and accompanist. Pet. App. 5a. Petitioner Kim applied for visa preference status as a professional worker—a third category preference (see 8 U.S.C. 1153(a)(3)). Pet. App. 5a, 6a n.1. Her application was initially approved by the District Director of the Immigration and Naturalization Service, but the approval was subsequently revoked, and her preference status petition was denied. *Id.* at 5a.

Petitioner Full Gospel moved to reopen and reconsider the denial of the original petition; it also submitted a new petition requesting that Kim be given a sixth category preference pursuant to 8 U.S.C. 1153(a)(6).[1] Pet. App. 5a-6a. Without acting on Full Gospel's requests, INS commenced deportation proceedings against Kim in November 1987. *Id.* at 6a. In February 1988, petitioners commenced the instant action in district court. *Ibid.*

On October 17, 1988, the district court issued a memorandum opinion and order concluding that INS had improperly refused to grant petitioner Kim a preference visa (Pet. App. 63a-101a), and directing it "to consider and to abide by [the court's] determinations * * * as to [petitioner Kim's] visa petitions in any matter relating to adjustment of [her] status." *Id.* at 103. Petitioners then moved for attorney's fees and costs under the Equal Access to Justice Act, 28 U.S.C. 2412(d), for the district court proceedings and

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[1] This preference status is available to qualified immigrants capable of performing skilled or unskilled labor for which a shortage of employable and willing persons exists. Pet. App. 8a n.1.

for the INS administrative proceedings both before and after the civil action. Pet. App. 7a. On October 4, 1989, the court granted the fee motion. *Id.* at 7a, 40a-48a. The award for the administrative proceedings was $12,334.79, including fees for 106 hours spent in pre-litigation visa proceedings and the deportation hearing, and 13 hours spent in post-litigation proceedings relating to the adjustment of petitioner Kim's status. *Id.* at 8a-9a.

The government appealed the district court's award of fees for the administrative proceedings, and the D.C. Circuit reversed the entire administrative fee award in a *per curiam* opinion. Pet. App. 4a-21a. The court held that an EAJA fee award is not available pursuant to 28 U.S.C. 2412(d)(3) for administrative deportation proceedings, because those proceedings are not "adversary adjudication[s]." Pet. App. 9a-11a.[2]

The court also rejected petitioners' argument that under *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), they are entitled to recover EAJA fees for the pre-litigation administrative proceedings pursuant to 28 U.S.C. 2412(d)(1)(A). The court held that acceptance of petitioners' interpretation of the statute "would nullify the limitations Congress placed on fee awards

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[2] EAJA permits a court to award attorney fees for both the civil action and the related agency proceedings to a party who prevails on judicial review of an administrative proceeding that is an "adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code." 28 U.S.C. 2412(d)(3). "[A]dversary adjudication" is defined in 5 U.S.C. 504(b)(1)(C) as an "adjudication under [5 U.S.C.] section 554." Section 2412(d)(3) thus tracks 5 U.S.C. 504, providing for the award of fees by the agency itself. Under both provisions, fees are available only for "adversary adjudication[s]."

for administrative proceedings" (Pet. App. 12a), since petitioners' interpretation would "override 28 U.S.C. § 2412(d)(3), the judicial review EAJA provision allowing fees only for adversary agency adjudications to parties who eventually prevail in court." Pet. App. 13a; *id.* at 22a, 29a (R.B. Ginsburg, J., concurring).

Finally, the court held that petitioners are not entitled to fees for the 13 hours spent in administrative proceedings subsequent to the district court's final judgment on the merits. Pet. App. 13a-21a. The court again rejected petitioners' reliance upon *Hudson*. The court stated that for the *Hudson* rationale to apply, "there must be a remand by the reviewing court and 'detailed provisions for the transfer of proceedings from the courts to the [agency],' which would implicate 'a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the [APA],' * * * before the award of fees can be even considered." *Id.* at 18a, quoting *Hudson*, 490 U.S. at 885.

Judge Ruth B. Ginsburg dissented in part, contending that plaintiffs should receive fees for administrative proceedings that occurred subsequent to the district court's ruling on the merits. Pet. App. 22a-32a.

ARGUMENT

1. As petitioners recognize, the first issue upon which they seek certiorari is identical to that in *Ardestani* v. *INS*, No. 90-1141 (argued Oct 8, 1991).[3] Accordingly, with respect to question 1 presented in the petition for certiorari, the petition should be held pending the Court's decision in *Ardestani*, and should then be disposed of in light of that decision.

2. Alternatively, petitioners argue, citing *Sullivan* v. *Hudson*, 490 U.S. 877 (1989), that they are entitled to an award of EAJA fees for the pre- and post-litigation INS administrative proceedings under 28 U.S.C. 2412(d)(1)(A) on the theory that those proceedings are part of a "civil action." The court of appeals correctly rejected this argument, and the court's holding does not conflict with any decision of this Court or any other court of appeals. Accordingly, certiorari should be denied with respect to questions 2 and 3 of the petition.

Hudson held that under the "unusual" statutory scheme at issue in that case—the scheme governing post-remand Social Security disability benefits proceedings—EAJA fees were available even though the administrative proceedings were non-adversarial, because those proceedings are "so intimately connected with judicial proceedings as to be considered part of the 'civil action' for purposes of a fee award." 490 U.S. at 885, 892. But the Court emphasized that the

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[3] In addition to the circuits cited in the petition (Pet. 22), three other circuits have recently decided this issue adversely to petitioners' position. *Hashim* v. *INS*, 936 F.2d 711 (2d Cir. 1991), petition for cert. pending, No. 91-207; *Hodge* v. *United States Dep't of Justice*, 929 F.2d 153 (5th Cir. 1991), petition for cert. pending, No. 91-83; *Escobar* v. *INS*, 935 F.2d 650 (4th Cir. 1991).

Social Security statutory scheme required "a degree of direct interaction between a federal court and an administrative agency alien to traditional review of agency action under the Administrative Procedure Act," because the statutory provision granting judicial review contained "detailed provisions for the transfer of proceedings from the courts to the Secretary and for the filing of the Secretary's subsequent findings with the court." *Id.* at 885. Thus, the administrative proceedings on remand were "wholly ancillary to a civil action for judicial review" and "necessary to the completion of a civil action" (*id.* at 892). See *Melkonyan* v. *Sullivan*, 111 S. Ct. 2157, 2162 (1991) (*Hudson* "stands for the proposition that in those cases where the district court retains jurisdiction of the civil action and contemplates entering a final judgment following the completion of administrative proceedings, a claimant may collect EAJA fees for work done at the administrative level" (citing *Hudson*, 490 U.S. at 892)). The instant case does not satisfy the *Hudson* criteria.

a. As the court below unanimously recognized (Pet. App. 11a-13a, 22a, 29a), there is no merit to petitioners' attempt, on the authority of *Hudson*, to read 28 U.S.C. 2412(d)(1)(A) to authorize EAJA fee awards for pre-litigation administrative proceedings not covered by 28 U.S.C. 2412(d)(3). Accord *Pollgreen* v. *Morris*, 911 F.2d 527 (11th Cir. 1990) (attorney hours spent in non-adversary administrative proceeding prior to the filing of the action in federal court are not reimbursable).

Hudson manifestly did not suggest, as petitioners contend (Pet. 25), that whenever a party must exhaust administrative remedies before seeking judicial relief, the administrative process is "intimately tied"

to the civil action. Indeed, such a holding would read the "adversary adjudication" requirement of 28 U.S.C. 2412(d)(3) out of the statute. But Congress specifically provided in 28 U.S.C. 2412(d)(3) that EAJA fees are available only for administrative "adversary adjudication[s], as defined in [5 U.S.C.] 504 (a)(1)." Petitioners' interpretation of *Hudson* is at odds with both the principle of strict construction of waivers of sovereign immunity (see, *e.g.*, *Library of Congress* v. *Shaw*, 478 U.S. 310, 318 (1986)) and "the established principle that a court should 'give effect, if possible, to every clause and word of a statute.'" *Moskal* v. *United States*, 111 S. Ct. 461, 466 (1990).

In essence, petitioners make a policy argument that ignores the language and structure of EAJA, a limited waiver of sovereign immunity. Petitioners evidently believe that EAJA should be expanded to apply to all administrative proceedings. But that is not the statute Congress enacted, and the relief petitioners seek can come only from Congress. *St. Louis Fuel & Supply Co.* v. *FERC*, 890 F.2d 446, 451 (D.C. Cir. 1989) ("[i]t is, of course, the province of Congress, not this court, to determine whether EAJA * * * should be amended"). Since the court of appeals' unanimous holding on this point does not conflict with *Hudson*, or with the decision of any other court of appeals, petitioners' argument does not warrant further review by this Court.

b. Nor is there merit to petitioners' claim that *Hudson* supports an award of fees for the 13 hours spent by their attorneys in administrative proceedings that occurred subsequent to the district court's decision on the merits.

Hudson holds only that fee awards are available for administrative proceedings on remand in benefits liti-

gation under a statutory scheme that provides the court with continuing jurisdiction over post-remand proceedings. 490 U.S. at 892. The Court specifically distinguished cases in which the district court acts, as under the Administrative Procedure Act, "'in [its] accustomed role as external overseer[] of the administrative process'" (*id.* at 885; citation omitted). In contrast, in this case, had INS refused to adjust petitioner Kim's status, the district court could have reviewed that decision only under the APA—the very statute distinguished by the Court in *Hudson*.

In *Pollgreen* v. *Morris*, *supra*, the Eleventh Circuit held that, in the particular circumstances of that case, the INS administrative proceedings for assessing fines and seizing vessels were intertwined with the plaintiffs' civil action, and therefore EAJA fees were available for post remand proceedings under 28 U.S.C. 2412(d)(1)(A). The court of appeals correctly disagreed with the *Pollgreen* court's view that *Hudson* is not limited to statutory schemes like the Social Security Act, where the reviewing court and the agency act as "[virtual] co-participants in the [administrative] process." *Hudson*, 490 U.S. at 885.

In any event, the court of appeals here correctly observed that *Pollgreen* more closely resembled *Hudson* than does the instant case, since in *Pollgreen* there were two remands from the court to the agency and the court retained continuing jurisdiction over the case, whereas here the district court never remanded the case and did not retain continuing jurisdiction over post-judgment administrative proceedings. Pet. App. 16a n.3. In the instant case, therefore, unlike both *Hudson* and *Pollgreen*, there was no remand that could create the "requisite ancillary relationship" between the civil action and the post-judgment ad-

ministrative proceedings. *Pollgreen*, 911 F.2d at 535; see also *Sullivan* v. *Finkelstein*, 110 S. Ct. 2658, 2666 (1990) (discussing *Hudson* as a case involving a remand). Thus, in view of the court of appeals' alternative holding that petitioners do not satisfy "even [*P*]*ollgreen's* * * * tests" (Pet. App. 17a), and the absence of any indication that the Eleventh Circuit would disagree with that conclusion, there is no square conflict between this case and *Pollgreen*.

CONCLUSION

With respect to question 1, the petition for a writ of certiorari should be held pending the Court's decision in *Ardestani* v. *INS*, No. 90-1141 (argued Oct. 8, 1991), and thereafter disposed of as appropriate in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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